trol the price at which the complete package shall be resold by the jobber, or by retailers who buy from the jobber. The case was decided in connection with the Sherman Anti-Trust Act and the court held that the manufacturer could not thus, by binding contract, control the price without violating the act.

It will be readily seen that the question here differs widely from that which arose in the Cream of Wheat case, because in that case the manufacturer did not attempt to control the price by a binding contract, but merely refused to sell to those who refused to maintain the desired retail price. The legal effect in the two cases is very different, although it seems that if both practices were permitted the end attained by the manufacturer might in some cases be similar.

The conclusion reached in the Corn Flakes case was eminently sound. The general rule is well settled that such a system of contracts, whereby the manufacturer fixes prices and eliminates competition, are invalid at common law and so far as they affect interstate commerce under the Sherman Act.[13] And such agreements are not excepted from the rule because the article to which they have reference is manufactured under a secret process.[14] Moreover, the copyright act does not give the right to fix the price at which future sales by the vendee should be made.[15] And if the transfer of a patented article is complete an attempt to fix the price at which it is to be sold is of no avail.[16]

It therefore appears from a view of the authorities and a consideration of the two recent cases [17] that a single manufacturer, when not combining with others, may refuse under proper circumstances to sell to those dealers who will not maintain a certain retail price, but that the manufacturer cannot lawfully and by binding contract force a dealer to whom he has sold goods to maintain a designated retail price.

APPLICATION OF PAYMENTS BY THE CREDITOR IN THE ABSENCE OF ANY DIRECTION BY THE DEBTOR.—It is a general rule that where a debtor owing on several demands to the same person, makes a payment without directing its application, the creditor may apply it to that obligation which he may elect.[1] Though the

[13] Dr. Miles Medical Co. *v.* Park & Sons, 220 U. S. 373, 400; John D. Park & Sons Co. *v.* Hartman, 153 Fed. 24, 82 C. C. A. 158, 12 L. R. A. 135.

[14] Dr. Miles Medical Co. *v.* Park & Sons, *supra*. John D. Park & Sons Co. *v.* Hartman, *supra*.

[15] Straus *v.* American Pub. Ass., 231 U. S. 222, 231, L. R. A. 1915A 1099, Ann. Cas. 1915A 369.

[16] Bauer *v.* O'Donnell, 229 U. S. 1, 50 L. R. A. (N. S.) 1185. See 1 VA. LAW REV. 445.

[17] Great Atlantic & Pacific Tea Co. *v.* Cream of Wheat Co., *supra;* United States *v.* Kellogg Toasted Corn Flakes Co., *supra*.

[1] Brewer *v.* Knapp, 1 Pick. 332; Washington Bank *v.* Prescott, 20 Pick. 339.

creditor need not make this election immediately,[2] he does have to exercise the right before suit is brought upon the demand.[3] But after the creditor has applied the payment the debtor is bound by his application.[4]

This right of the creditor to make the application in the absence of any appropriation by the debtor is subject to some restrictions. Where the rights of third parties have intervened, the creditor cannot make an application which would be injurious to them;[5] nor can he apply the payment to an illegal demand.[6] But the creditor may apply the payment to a debt which is merely unenforceable because of the statute of frauds.[7] So he may make an application to a claim which is barred by the statute of limitations.[8] But on the question as to whether the bar of the statute applies as to the remainder of the debt by such application, the cases are conflicting. One line of authority holds that the remainder of the debt is not thereby taken out of the statute.[9] This ruling is upon the ground that, in order to revive the debt, the debtor must have intended to revive, and that the mere making of a general payment does not raise such a presumption.[10] The

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[2] Mayor and Commonalty of Alexandria *v.* Patten, 4 Cranch. 317.

[3] United States *v.* Kirkpatrick, 9 Wheat. 720. But it has been held that where the debtor made a payment with no direction as to its application and the creditor failed to make an appropriation, the debtor, when sued on one of the demands, had a right to insist that the payment be applied to the demand sued on. Dent *v.* State Bank, 12 Ala. 275.

[4] Bank of California *v.* Webb, 94 N. Y. 467; Risher *v.* Risher, 194 Pa. St. 164, 45 Atl. 71. But if the creditor make no application a subsequent direction by the debtor is binding. Huffman *v.* Cauble, 86 Ind. 591.

[5] Clow *v.* Goldstein, 147 Ill. App. 571. Here, the defendant had employed a contractor to do some work on a building owned by the defendant. The contractor purchased materials for the work from the plaintiff with money given him by the defendant for that purpose. The contractor paid the plaintiff without saying anything as to the application of the payment. The plaintiff applied it in satisfaction of another demand due him from the contractor. In an action by the plaintiff to subject the defendant's building to a mechanic's lien for the materials supplied, it was held that the plaintiff should have applied the payment to the debt for which the defendant's property was liable.

[6] *Claim for purchase price of liquor sold illegally:* Kidder *v.* Norris, 18 N. H. 532. *Usurious demand:* Adams *v.* Mahnken, 41 N. J. Eq. 332, 7 Atl. 435. *Demands illegal because the creditor, a corporation, had failed to comply with the law:* Armour Packing Co. *v.* Vinegar Bend Lumber Co., 149 Ala. 205, 42 South. 866.

[7] Haynes *v.* Nice, 100 Mass. 337, 1 Am. Rep. 109; Murphy *v.* Webber, 61 Me. 478. The distinction between cases of this character and those involving illegal demands is grounded on the inherent difference between those contracts which the law simply declines to enforce, and those which it actually prohibits. See Phillips *v.* Moses, 65 Me. 70.

[8] Pond *v.* Williams, 1 Gray 630; Beck *v.* Haas, 31 Mo. App. 180; McBride *v.* Noble, 40 Colo. 372, 90 Pac. 1037.

[9] Pond *v.* Williams, *supra;* Ramsey *v.* Warner, 97 Mass. 8; McBride *v.* Noble, *supra. Contra,* Beck *v.* Haas, *supra;* Sanborn *v.* Cole, 63 Vt. 590, 22 Atl. 716, 14 L. R. A. 208.

[10] See Ramsey *v.* Warner, *supra.* The court said: "If the creditor makes an appropriation, he may do it to a debt barred by the statute of limitations; but such an appropriation will not have the effect to

contrary view is based upon the theory that the debtor is presumed to have intended *any* application which the creditor has made [11] and that an intended payment on the debt is a recognition thereof which takes it out of the statute. By the weight of authority the creditor may apply a general payment to a debt not already barred by the statute of limitations, and thereby interrupt the running of the statute.[12]

In the case of a debt not due for obvious reasons a contrary rule applies and there can be no application thereto, without the consent of the debtor.[13] The recent case of *D'Yarmett* v. *Cobe* (Okla), 151 Pac. 589, is in line with this ruling. If the principle enunciated by those courts which hold that a debt barred by the statute of limitations is taken out of the operation of the statute by the creditor's application of a payment thereon, is applied to this kind of a case, the opposite result would be reached. It is unlikely that any court will carry a presumption of intention to this extent and, aside from the question of the soundness of that theory in regard to the debts barred by the statute of limitations, it is hardly relevant in the case of debts not due, because of the great dissimilarity of liability on a debt past due and barred and on one not yet due.

In *D'Yarmett* v. *Cobe*, the note not due was also one against which the defendant claimed the defense of failure of consideration. Whether a creditor has a right to apply a general payment to such a note was not decided in that case except incidentally. It would seem that such an application would be compelling the debtor to pay a debt which might be without foundation, and hence should not be permitted.[14]

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take the debt out of the operation of the statute. It seems to be regarded as a mere permission of law to the creditor thus to apply it, and not an intentional payment on that account, which is necessary to involve the admission of the whole debt and the implied renewal of the promise to pay it. The debtor is not presumed to have intended to renew a promise which is no longer legally biding upon him, although he has put it in his creditor's power to satisfy *pro tanto* a claim upon which he had lost his legal remedy."

[11] See Sanborn *v.* Cole, *supra.* The court said: "When the debtor leaves the application to be made by the creditor, or in default of action on the part of the creditor by the law, he must be held to have intended such application as may finally be made by the creditor."

[12] Blake *v.* Sawyer, 83 Me. 129, 23 Am. St. Rep. 762, 12 L. R. A. 712; Young *v.* Alford, 118 N. C. 215, 23 S. E. 973; McDowell *v.* McDowell's Estate, 75 Vt. 401, 56 Atl. 98. *Contra,* Royston *v.* May, 71 Ala. 398.

[13] Early *v.* Flannery, 47 Vt. 253; Heard *v.* Pulaski, 80 Ala. 502, 2 South. 343; McWhorter *v.* Bluthenthal, 136 Ala. 568, 33 South. 552.

[14] See Stone *v.* Talbot, 4 Wis. 442.